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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON,
individually and as representatives of all royalty
owners to whom Phillips Petroleum Company made
payment of suspended proceeds of royalties pursuant
to Federal Power Commission Opinion Nos. 699, 699H,
749, 749C, 770 and 770A,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a defendant has standing in this Court to raise the due process rights of absent plaintiff class members as a basis for reversing a state court judgment in favor of those class members.

2. Whether the Due Process Clause prohibits a state court from exercising personal jurisdiction over nonresident plaintiff class members to whom the court provides: (1) adequate representation through the named plaintiffs and their attorneys; (2) first class mail notice describing the action; (3) the right to participate; and (4) the right to opt out.

3. Whether the Due Process and Full Faith and Credit Clauses prohibit a state court from applying basic principles of restitution embodied in that State's law to a nationwide class where the dispute arose as a by-product of federal administrative rate regulation, the measure of damages employed was established by the defendant's own actions taken in response to that regulatory process, and there has been no showing of a relevant conflict with any other State's law.

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to Federal Power Commission Opinion Nos. 699, 699H,
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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case arose because of the way in which the federal government regulates gas prices, and the effect of that regulatory process on the rights of royalty owners. During the time in question, the Federal Power Commission ("FPC") (now the Federal Energy Regulatory Commission) was authorized to engage in retroactive rate approval. A regulated company, such as the peti-

tioner in this case, was allowed to charge unapproved prices for its gas, subject to a written undertaking with the FPC to refund any excess to purchasers, along with a prescribed rate of interest, if those prices were not ultimately approved. See 18 CFR § 154.102. This regulatory process did not directly control the rights of royalty owners, however, even though they were clearly affected by its operation since all royalty payments were based on FPC-approved gas prices. Pet. App. 33.

The three FPC proceedings that led to this case involved reviews of nationwide rates being charged by petitioner Phillips in the mid-1970's. While these reviews were taking place, Phillips "suspended" a portion of the payments to royalty owners on the ground that the unapproved part of its rates might later be subject to recoupment. In each instance, however, Phillips agreed to pay the full royalty, based on the unapproved rate, if the royalty owner provided a bank letter or corporate indemnity guaranteeing repayment plus interest at the FPC prescribed rates if the full gas price was not subsequently approved. Pet. App. 51. See also *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1299 (1977), cert. denied, 434 U.S. 1068 (1978) ("*Shutts I*"). A very small percentage of royalty owners provided such an indemnity and thereafter received full royalty payments in a timely fashion. Pet. App. 51.

The remaining royalty owners received no royalty on the unapproved portion of the rates until the FPC rulings on those rates became final. The three rate proceedings at issue here ultimately led to the payment of "suspense royalties" of \$3.7 million in July 1976, \$4.7 million in July 1977, and \$2.9 million in February 1978. Pet. App. 50. Although Phillips had the use of this \$11.3 million for several years, it refused to pay royalty owners any interest whatsoever when it finally paid the royalties.

The instant suit was filed in July 1979 by one royalty owner in Kansas and two in Oklahoma seeking to represent a class of royalty owners and gas producers who had received suspense payments without interest from Phillips. J.A. 4. The trial court limited the class to royalty owners, however, finding that the producers' claims raised separate issues. J.A. 17-19. The number of potential class members was approximately 33,000 people, who resided in every state in the country. Pet. App. 49. While the amount allegedly due each class member varied, the average claim was for interest on about \$340 (amounting to less than \$100), which the trial court found to be "too small to enable each to file a separate action." J.A. 18.¹

Pursuant to order of the trial court, every potential class member was sent a notice by first class mail, paid for by plaintiffs, describing the action and advising the class member that he could appear in person or by counsel, and that he could opt out of the case by signing and returning the "request for exclusion" that was included with the notice. J.A. 20-22. The final class as certified contained 28,100 members; 3,400 people had opted out and notice could not be delivered to another 1,500 people. Pet. App. 50. Close to 1,000 class members resided in Kansas and a small undetermined additional number owned leaseholds in that State.

After a trial based essentially on undisputed facts, the court concluded that under established precedent in Kansas, including a decision by the Kansas Supreme Court in a virtually identical case involving areawide rate proceedings, see *Shutts I*, the royalty owners were owed interest on the suspense royalties from the date Phillips received the payments until the full royalties and

¹ Phillips sought to mandamus the trial court to exclude all non-resident class members from the action. The Kansas Supreme Court denied the petition without opinion on June 28, 1982, and this Court denied certiorari. *Phillips Petroleum Co. v. Duckworth*, 459 U.S. 1103 (1983).

interest were paid. The rate of interest was set at precisely the rate provided for in the federal regulations—i.e., the rate that Phillips would have had to pay purchasers on refunds and the rate Phillips had demanded in the indemnity agreements from royalty owners.²

The Kansas Supreme Court affirmed, except that it applied the 15% Kansas statutory interest rate, rather than the FPC rates, to post-judgment interest. The court rejected Phillips' claim regarding the application of the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), as a basis for asserting personal jurisdiction over nonresident class members. It held instead that procedural due process—assured by the Kansas class action statute, which was modelled on Federal Rule 23—provided a sufficient constitutional predicate for this purpose. The court also noted that no other action had been brought on these claims, and that the statute of limitations had run in other States. Pet. App. 17.

The court then found Phillips' efforts to differentiate among various royalty owners—on the basis of such factors as whether Phillips sold the gas or used it, or whether Phillips had agreements regarding interest with producers that it purchased from—to be unavailing. It pointed out that every class member's royalty payments were tied directly to the FPC-approved gas rates, and that "[a]ll suspense monies were withheld and paid out to all royalty owners on a uniform basis. All royalty owners were notified of the right to receive the additional royalties during the suspension period if an acceptable indemnity was filed with Phillips." Pet. App. 41.

² As provided in the federal regulations, the rate varied over time depending on bank prime rates. The specific rates are set out at Pet. App. 54.

The Kansas Supreme Court next addressed Phillips' argument that it should look to the law of each of the eleven states in which the underlying leaseholds were located to determine the interest due on the suspended royalties. Pet. App. 43. The court also rejected this claim, ruling that the FPC interest rates were a proper measure of damages in the circumstances presented. Relying on the equitable principles set out in its earlier opinion in *Shutts I*, the court said that it saw no reason not to adhere to those principles in this case. It also concluded that "[t]he common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money." Pet. App. 43.

SUMMARY OF ARGUMENT

I. Phillips lacks standing to argue that the Kansas courts did not obtain personal jurisdiction over nonresident class members. That claim rests solely on the due process rights of those absent class members. See *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984). The established rule is that a party may not assert rights belonging to others except in narrow circumstances not present here. See *Singleton v. Wulff*, 428 U.S. 106 (1976). In no instance has this Court allowed a party to raise the rights of its adversary in an effort to undermine his adversary's interests. This case provides no justification for departing from the established rule.

II. The "minimum contacts" requirement, developed for determining when a nonresident defendant can be haled into a faraway court and forced to defend himself or fail to do so at his peril, see *International Shoe Co. v. Washington*, *supra*, is an inappropriate constitutional standard for testing the assertion of jurisdiction over

nonresident class action plaintiffs. The basic distinctions between nonresident plaintiff class members and nonresident defendants amply justify different approaches to personal jurisdiction. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940). The process afforded class members by Kansas included an assurance of adequate representation, see *id.*, first class mail notice, see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the right to appear personally or by counsel, and the right to opt out. Due process requires no more.

Petitioner itself acknowledges that an "opt-in" class action procedure would be constitutionally adequate. Br. at 16 n.13. The essential jurisdictional dispute in this case thus reduces to the difference between an opt-out and opt-in requirement. In our view, the opt-out approach—which was specifically adopted under the Federal Rules, Rule 23(b)(3), (c)(2)(A)—is constitutionally preferable: it allows small claimants to remain in without requiring them to contact an attorney or take other actions before they execute an opt-in agreement; at the same time, it protects larger claimants who either have counsel or have a sufficient amount at stake to assure that they will take proper steps to decide whether it is in their interest to opt out and proceed on their own.

III. The application of basic equitable principles of restitution to the facts of the instant case violated no constitutional proscription concerning choice of law. The measure of damages authorized by the court below, while premised on Kansas law, can hardly be said to be "arbitrary or fundamentally unfair" in any constitutional sense. See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). It was based, in fact, solely on Phillips' undertaking with the FPC and its indemnity offer to class members. Despite petitioner's suggestion to the contrary, there is no real basis for claiming that the laws of other States would have led to a different result. See *Shutts I*, 567 P.2d at 1317-21.

In any event, even assuming that the Kansas court erred in applying its own law to all claims, the error was harmless. Phillips itself appears to acknowledge that Oklahoma—where Phillips has its principal place of business, where it held the suspense royalties, and from where it mailed those royalties to all class members—has a sufficient interest to allow that State's law to be applied to all claims. See, e.g., *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915). The Kansas Supreme Court in its predecessor decision in *Shutts I* examined Oklahoma law and found it to be in accord with the legal principles applied here. Nothing has changed since then to indicate that any other decision would be warranted now.

ARGUMENT

Raising the spectre of "irreparable damage to federalism," Br. at 39, Phillips seeks reversal of the decision below by invoking first the due process rights of absent class members and then the sovereignty interests of absent States. Curiously, no class member has sought to intervene and no State has filed an *amicus* brief. The reason, we suggest, is because the rulings by the Kansas courts fully protected the legitimate interests of all class members and in no way trespassed on the sovereignty interests of any Sister State. Phillips' real concern is to prevent meaningful class action proceedings and thereby deny many class members relief clearly owed to them—relief that unless aggregated is too small to warrant being pursued. Neither the Due Process Clause or any constitutional notion of federalism requires such an unjust result.

I. PHILLIPS LACKS STANDING TO RAISE DUE PROCESS CLAIMS BELONGING EXCLUSIVELY TO ADVERSE PARTIES WHO ARE FULLY CAPABLE OF RAISING SUCH CLAIMS THEMSELVES.

Phillips' first argument—that the Kansas courts impermissibly exercised personal jurisdiction over nonresident plaintiff class members—rests solely on its ability to

assert the due process claims of those class members. Such an effort, however, is barred by the well-established prudential doctrine requiring that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). While there are limited exceptions to this principle, see, e.g., *Singleton v. Wulff*, *supra*, 428 U.S. at 114-116, the Court has never suggested that a party has standing to raise the rights of its *adversary*. The facts of the instant case demonstrate that this is not an appropriate occasion to create such an exception. Cf. *Zablocki v. Redhail*, 434 U.S. 374, 380 n.6 (1978) (named defendant cannot raise due process claims of absent *defendant* class members).

Phillips does not argue that *it* is not amenable to suit in Kansas by all nonresident class members. Nor does it assert that any claim, other than one resting solely on the rights of class members, would have prohibited the exercise of jurisdiction by the courts below. Such an argument would be untenable in any event. Only recently this Court made clear that "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, *supra*, 456 U.S. at 702 (footnote omitted) (emphasis supplied). As a result, a nonresident plaintiff, much like any defendant, can consent to jurisdiction. See *Keeton v. Hustler*, *supra*, 104 S. Ct. at 1480-81.³

³ Phillips recognizes this principle when it admits that a state court can exercise jurisdiction over nonresident class members, with or without "minimum contacts," if it uses an "opt-in" provision. Br. at 16 n. 13. See p. 21 *infra*. Despite this recognition, however, in its petition for certiorari Phillips claimed that both due process

It is equally obvious that Phillips has no desire to protect absent class members. Quite to the contrary, its only interest in raising their rights is to defeat their recovery.⁴ Not a single absent class member has ever sought to initiate separate litigation. And if one had, Phillips' view of his rights would have been very different indeed. Thus, when three absent Texas class members attempted to opt out in *Shutts I*, "Phillips filed a motion to deny the request for exclusion alleging in part that the three men would file a class action suit in Texas." 567 P. 2d at 1313. In short, Phillips plainly is not here seeking to bring about a multiplicity of lawsuits in various states. Its only possible interest, therefore, is to defeat class

and sovereignty concerns warranted a minimum contacts rule for absent class plaintiffs. Pet'n at 5-12. It has now changed course, arguing in its brief first that the Due Process Clause alone requires such minimum contacts. Later, after making a separate argument concerning the choice-of-law issue, Phillips concludes with a third argument to the effect that federalism concerns bar the combined assertion of jurisdiction *and* application of Kansas law. This combined argument is fundamentally misguided, however. As the Court stated in *Keeton v. Hustler*, *supra*, 104 S. Ct. at 1480, "we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." Phillips' argument is especially inappropriate here because its jurisdictional claim is based exclusively on the rights of its adversaries, whereas its choice of law argument rests in part on its own rights. By lumping the claims together Phillips generates much heat but no light. See note 18 *infra*.

⁴ To the extent Phillips is concerned whether absent classmembers will be bound by the judgment, that issue cannot be finally resolved in the initial class action. See p. 11 *infra*. Moreover, as one commentator put it in discussing *Shutts I*, "the issue of binding nonresident class members was, from the standpoint of the class, virtually moot. The judgment below had been in favor of the class. All that remained was to distribute damages to the victorious class members. A trial court in that posture could easily structure distribution to ensure that acceptance of the award would constitute consent to the court's jurisdiction and waiver of all future claims against the defendant." Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 735 (1979) (footnote omitted).

members' claims. There could hardly be a more compelling reason for prohibiting a party from pressing the rights of others.

The rationale that led to this standing doctrine confirms this conclusion. A party is barred from raising another's rights because: (1) "the holders of those rights either [may] not wish to assert them, or will be able to enjoy them whether the in-court litigant is successful or not"; and (2) "third parties themselves usually will be the best proponents of their own rights." *Singleton v. Wulff*, *supra*, 428 U.S. at 114 (citations omitted). In this case, it is obvious that absent class members have no interest in seeing their rights raised to defeat their recovery. Those absent class members, moreover, might well take a different view of what their rights are. Thus, the reasons for applying the doctrine are present here.

The Court has authorized a limited exception to this doctrine when (1) the relationship of the litigant to the third party is such that the litigant's interest in asserting the other's rights assures that he will be an effective proponent, and (2) it appears that the third party himself might otherwise be denied the opportunity to protect his rights. *See id.* at 114-116. Neither criteria supports petitioner's standing here.⁵ Not only is Phillips' interest di-

⁵ *Hanson v. Denckla*, 357 U.S. 235 (1958), relied on by Phillips, is not to the contrary. There, a defendant was allowed to assert the in personam rights of a nonresident co-defendant who did not appear in the action. In contrast to this case, the co-defendant whose rights were pressed had no interest that was adverse to the party given standing. Moreover, the Court allowed the in-court defendant to raise the issue because under the forum State's law the action could not proceed unless there was jurisdiction over the absent co-defendant. *See id.* at 245. In this case, however, it is clear, as Phillips itself concedes, that an action against it would have been maintainable by Kansas residents, with or without the nonresident class members.

Phillips reads *Hanson* to require only that the defendant have a "direct and substantial personal interest in the outcome" to allow

rectly antagonistic to the interest of those whose rights it seeks to assert,⁶ but there is no question that the parties possessing the rights are fully able to exercise them if they so wish. Despite the pendency of the instant action, any nonresident class member remained free to initiate his own suit against Phillips and test whether the Kansas court had properly exercised jurisdiction over him. That issue simply could not be conclusively determined by the first court purporting to assert jurisdiction. *See, e.g., Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). *See generally* Note, *Binding Effect of Class Actions*, 67 Harv. L. Rev. 1059 (1954). Consistent with these principles, this Court has reviewed many cases involving collateral challenges to class actions, testing whether the first court had obtained jurisdiction over absent class members. *See* cases cited at p. 18 *infra*. In no instance were these claims presented by anyone other than the absent class member himself.

The effect of this standing doctrine as applied here admittedly has an element of non-mutuality to it: by preventing the defendant from asserting the due process rights of absent class members it allows those class members to accept a judgment if the named representatives prevail, while also allowing them a *chance* to relitigate

him to raise an absent party's jurisdictional claim. Reply Br. on Pet'n at 2 (citations omitted). Satisfying that criteria alone is not sufficient, however. *See, e.g., Warth v. Seldin*, *supra*; *Singleton v. Wulff*, *supra*.

⁶ The cases that have allowed parties to litigate others' rights involved relationships where the interest in the exercise of the right was coincident. *See, e.g., Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984) (fundraiser asserting rights of charitable organization that he solicits for); *Singleton v. Wulff*, *supra* (doctor-patient); *Craig v. Boren*, 429 U.S. 190 (1976) (seller of beer who wanted to sell to minors who wanted to buy); *Barrows v. Jackson*, 346 U.S. 249 (1953) (white covenantor who was sued for failure to honor covenant not to sell to blacks).

their claims if they lose. This consideration, however, should not lead to a different rule in the present situation. Much like with the use of one-way collateral estoppel against a defendant, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), there is nothing unfair about holding the defendant bound even though it is possible that an absent class member may not be. The defendant in these circumstances has "had a full opportunity to litigate the issues" knowing that the decision was presumptively applicable to the whole class. 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1789, at 182 (1972). *See also* Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 736-37 (1979).⁷ A defendant's legitimate concerns can thus be adequately protected by requiring him to wait until an absent class member attempts to attack the judgment on due process grounds. At that time the defendant will be able to secure a full test of the jurisdictional question by pressing his own interest—i.e., the binding effect of a judgment favorable to him. The issue will then be properly framed.

Nor is it of any consequence here that a defendant in a federal class action under Rule 23 can challenge adequacy of representation or notice, which are requirements designed to protect absent class members. Those and other criteria must be satisfied to comply with the provisions of the Rule, and are supposed to be assessed by "the court with the aid of the parties." 1966 Advisory Committee Notes to Rule 23, *reprinted in* 3B *Moore's Federal*

⁷ Before the 1966 Amendments to Federal Rule 23, in fact, class members in so-called "spurious"—i.e., common issue of law or fact—class actions could always unilaterally decide whether to be included in the class, *see Wabash R.R. v. Adelbert College*, 208 U.S. 38 (1908), sometimes even after judgment. *See, e.g., Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968), *aff'd* 254 F. Supp. 655 (E.D. Mich. 1966); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 569 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962).

Practice ¶ 23.01, at p. 237-27 (1984). Thus, the Rule, in effect, grants the defendant standing that he would not otherwise have, thereby allowing him to raise these issues in the trial court. *See Warth v. Seldin*, *supra*, 422 U.S. at 500. And even if such statutorily-created standing would also permit a defendant to press these issues on appeal in a federal class action,⁸ that rationale does not apply to a state class action statute, especially as a basis for allowing the defendant to appeal a due process claim, like the one here, that goes beyond the requirements of the statute in question.⁹

⁸ Whether the justification for non-mutuality in class actions, *see* p. 12 *supra*, would prohibit a defendant from raising inadequacy of representation or lack of notice to appeal a judgment against him in a federal action is unclear. The issue has almost never arisen for obvious reasons. There were a few instances in the early 1970's where federal courts refused to allow absent class members to rely on a favorable decision in a draft exemption case because they had not received notice, and therefore would not have been bound. *See Schrader v. Selective Service System, Local Bd. No. 76 of Wisconsin*, 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); *Pasquier v. Tarr*, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd on other grounds*, 444 F.2d 116 (5th Cir. 1971). These rulings have been subject to considerable criticism, *see, e.g.,* 7A C. Wright & A. Miller, *supra*, § 1789 at 181-83, and their continuing vitality is questionable after *Parklane Hosiery Co. v. Shore*, *supra*. *See generally* Note, *Class Action Judgments and Mutuality of Estoppel*, 43 Geo. Wash. L. Rev. 814 (1975).

⁹ The "minimum contacts" claim raised by Phillips is not an inquiry relevant to class action certification in Kansas. Pet. App. at 65-67. Thus, even if it could be said that the Kansas class action statute would confer standing in this Court to allow the defendant to litigate the requirements there at issue, that statute would still not give Phillips standing in this case. We note in this regard that the Kansas Supreme Court did consider various challenges by Phillips to the propriety of certifying the class under Kansas law. Pet. App. 20-24, 28-29. The fact that the court also considered the minimum contacts claim presented by Phillips does not confer standing to litigate the issue in this Court. *See, e.g., Tileston v. Ullman*, 318 U.S. 44 (1943).

In sum, there is no basis for departing from the established rule and allowing Phillips to raise the rights of absent class members to defeat their recovery. Those rights are fully capable of being raised by the class members themselves, who are best situated to espouse them.

II. A STATE COURT MAY CONSTITUTIONALLY EXERCISE JURISDICTION OVER NONRESIDENT PLAINTIFF CLASS MEMBERS REGARDLESS OF WHETHER THEY HAVE MINIMUM CONTACTS WITH THE FORUM STATE WHERE AS HERE SUCH CLASS MEMBERS ARE PROVIDED WITH ADEQUATE REPRESENTATION, PERSONAL NOTICE, A RIGHT TO PARTICIPATE, AND A RIGHT TO OPT OUT.

Capturing the essence of class action litigation, this Court recently stated that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of inequities unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). Phillips disregards this essential recognition as well as the basic differences between plaintiff class members and defendants, and urges the adoption of the "minimum contacts" rule to test all assertions of state court jurisdiction. The effect of such a rule, as the facts of the instant case illustrate, would be to deny judicial access for many small claimants dispersed throughout the country. It would thus allow national businesses to ignore their obligations to such people, knowing that the practicalities of modern litigation will limit, if not eliminate, meaningful redress. To invoke the name of due process in the service of such ends is ironic at best.

A. The Differences Between The Interests Of Nonresident Plaintiff Class Members And Those Of Nonresident Defendants Justify Different Due Process Requirements For Personal Jurisdiction.

"[D]ue process is flexible and calls for such . . . protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). With respect to state court assertions of personal jurisdiction, the Due Process Clause imposes certain requirements that make it fair to insist that a person have his interests adjudicated in that State. See, e.g., *International Shoe Co. v. Washington*, *supra*, 326 U.S. at 316; *Hansberry v. Lee*, *supra*, 311 U.S. at 42. Applying this principle to nonresident defendants, the Court has held that the "minimum contacts" test, first enunciated in *International Shoe*, is a constitutional prerequisite. There is no basis, however, for extending that standard to absent plaintiff class members, who are in a significantly different position.

It should be noted initially that, notwithstanding Phillips' suggestion to the contrary, the Court has never applied the minimum contacts rule to a non-defendant. Although Phillips quotes the language in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), to the effect that "all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny[,] it conveniently ignores the Court's later explanation of that precise quote as being limited to "defendant[s]." *Rush v. Savchuk*, 444 U.S. 320, 327 (1980). See also *Keeton v. Hustler Magazine, Inc.*, *supra*, 104 S. Ct. at 1480-81.¹⁰

¹⁰ This is not to suggest that a mere label should control the constitutional inquiry. A party faced with the same interests at stake as a defendant would obviously be entitled to the protection of the minimum contacts rule irrespective of the formal status assigned to him by state law. Cf. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916) (pre-*International Shoe* case involving interpleader).

Nor is there any justification for unhinging the minimum contacts rule from the specific considerations that gave rise to its creation. A defendant's interest in avoiding litigation is always great, irrespective of where the suit is filed. To afford him a measure of confidence in ordering his affairs and limiting his exposure—i.e., to protect “traditional notions of fair play and substantial justice,” *International Shoe v. Washington*, *supra*, 326 U.S. at 316—the Court has held that a defendant must have some contacts with a State before he can be forced to litigate there. A defendant, moreover, is invariably required to obtain counsel and stands to have a judgment entered against him, a judgment that may include coercive court orders, damages, and court costs. And if he fails to appear he faces a default judgment. Before *International Shoe*, these interests were thought to be of such magnitude as to require that the defendant actually be *present* in a State for him to be amenable to personal jurisdiction. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

An absent plaintiff class member, by contrast, has very different interests at stake.¹¹ The class action device, far from being a means by which to protect the absent class member against being unfairly haled into court, was developed to help assure judicial access for him. See *Deposit Guaranty National Bank v. Roper*, *supra*, 445 U.S. at 339. See generally Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).¹² In recognition of this purpose, the class action

¹¹ Whether the minimum contacts rule should apply to absent defendant class members is an issue not presented by this case. A defendant class member faces different risks and thus his due process protections should be assessed independently.

¹² Ironically, two of the key cases relied on by Phillips to support its claim of equivalence between defendants and plaintiffs with respect to the minimum contacts rule involved due process holdings invalidating barriers to plaintiff access to judicial or administrative proceedings. See *Boddie v. Connecticut*, 401 U.S.

was designed so that the absent plaintiff need not retain counsel or appear in court and cannot be subject to coercive court orders, damages, or the imposition of court costs.¹³ Rather, the absent plaintiff class member can sit idly by and reap the benefits of the class representative's effort. The only risk he faces is that he may be bound by the judgment if it is not favorable. This interest admittedly merits due process protection, see *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), but it hardly follows that the due process requirements that apply to an absent plaintiff class member should be the same as those that apply to a defendant. See generally Note, *Multistate Plaintiff Class Actions*, 69 Iowa L. Rev. 795, 806-809 (1984).

B. The Rights Of All Absent Class Members Were Fully Protected By The Procedures Used In Kansas.

The principles that govern personal jurisdiction in plaintiff class action suits are to be found not in the minimum contacts cases, but rather in *Hansberry v. Lee*, *supra*, and the cases discussed therein. Specifically acknowledging that class actions were a “recognized exception” to the “general rules” governing personal jurisdiction, the Court in *Hansberry* stated that such suits were intended to bind even persons “not within the jurisdiction” as long as “the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the

371 (1971) (filing fee in divorce proceedings); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (arbitrary time requirements in administrative proceedings).

¹³ There is no suggestion that Kansas would allow counterclaims against absent class members. If it did, that consideration might affect the constitutional balance. In general, courts have not permitted the assertion of counterclaims against absent class members. See, e.g., *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 488-89 (S.D.N.Y. 1973), discussed in Case Note, 87 Harv. L. Rev. 470 (1973).

former in the prosecution of the litigation in which all have a common interest." 311 U.S. at 41. While invalidating the particular action at issue there on the ground that the named plaintiffs had a conflict with the absent class members, the Court nevertheless took pains to note that it saw no due process objection to state court class actions, even when predicated on a "single issue of fact of law," if "the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 43.¹⁴

The Court in *Hansberry* also approvingly cited several cases in which it had upheld multistate (or national) class actions in state and federal courts. See, e.g., *Smith v. Swormstedt*, 57 U.S. (16 How.) 228 (1854); *Supreme Council of Royal Arcanum v. Green*, *supra*; *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938).¹⁵ None of these decisions reflected any concern about whether the nonresident plaintiffs had contacts with the forum State. The sole contact in most instances was that the class member held an insurance policy through a group fund or fraternal organization that was chartered in that State. This is particularly important because, as noted, the general rule for personal jurisdiction when these cases were decided required actual

¹⁴ Phillips suggests that *Hansberry* is sapped of its vitality because it antedated *International Shoe*. As noted above, however, the due process requirements for exercising jurisdiction over defendants were more stringent prior to *International Shoe*.

¹⁵ *Christopher v. Brusselback*, 302 U.S. 500 (1938), relied on by Phillips, detracts nothing from these rulings. In that case, a federal court was found to have lacked jurisdiction over several defendants who were stockholders of a bank. Under federal law, the obligations of the stockholders to the bank's creditors were personal and could only be enforced through a suit against them, and not through a suit against the bank.

presence.¹⁶ Even today, we doubt that such a contact would render someone amenable to jurisdiction as a defendant in the chartering State. If it did, it would certainly come as a surprise to millions of individuals who have insurance policies issued by mutual companies or through national membership organizations.

Rather than any minimum contacts concept of jurisdiction, the rationale that supported these so-called "common fund" cases was expressed in the first of the line, *Smith v. Swormstedt*, *supra*, a multistate class action involving a disputed church fund.¹⁷ There, the Court noted that even "though the rights of the several persons may be *separate and distinct*," a class action is appropriate if there is "a common interest or a common right, which the bill seeks to establish or enforce." 57 U.S. at 302 (emphasis supplied). Such an action is permissible because:

¹⁶ Phillips asserts "that the decisive factor in [these] cases was the significant affiliating circumstances among the defendant, the forum, and the litigation." Br. at 22 (footnote omitted). If this is meant to suggest that these factors—as distinct from the class nature of the litigation—supported jurisdiction over the non-resident plaintiffs, the suggestion is particularly inapt considering that the general rule for jurisdiction then required that a person be present. Nor could jurisdiction over the plaintiff class members have turned on any quasi-in-rem notion. The rights and obligations being adjudicated were individual to each classmember, as the Court made clear. See, e.g., *Hartford Life Insurance Co. v. Ibs*, *supra*, 237 U.S. at 673.

¹⁷ The claim by Phillips that no fund did or could exist in this case, Br. at 21 n.18, is mistaken. As Phillips' own behavior indicates, it held the suspense royalties on behalf of the royalty owners. It could have, and we believe should have, kept those funds in a separate interest-bearing account. Had it done so, the royalties and the interest would constitute a common fund. The fact that Phillips commingled these royalties with its other monies does not defeat this characterization. If anything, by commingling the funds, Phillips inappropriately put them at risk. Surely in the other common fund cases it would have had no effect on the jurisdictional issue if the fundholder had commingled the funds.

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Id. at 303, quoted in *Hartford Insurance Co. v. Ibs*, *supra*, 237 U.S. at 672. This same concern—"to prevent a failure of justice"—and this same assurance—"the rights of all being before the court by representation"—supported the exercise of personal jurisdiction over nonresident class members in this case. See *Restatement (Second) of Judgments* § 41 (1982); 3B *Moore's Federal Practice* ¶ 23.11[5], at p. 23-2893 (1984); *Newberg on Class Actions* § 1206 *et seq.* (1980 Supp.).

Indeed, the Kansas court went considerably further to protect nonresident class members. In addition to insisting that the named plaintiffs have the identical interest at stake as did the absent class members, and that they and their counsel adequately represent the class, the court also required first class mail notice (at plaintiff's expense) to all class members. See *Eisen v. Carlisle & Jacquelin*, *supra*, 417 U.S. at 172-178. Moreover, it gave class members the right to participate in person or through counsel, and the right to opt out of the litigation simply by signing and returning to the court a clearly-worded form included with the notice. Taken together these procedures amply protected the legitimate due process rights of nonresident plaintiffs.

Significantly in this regard, while going on at length about the minimum contacts rule and the supposed erosion of state sovereignty in its absence, Phillips is forced to concede that an "opt-in" requirement would be constitutionally adequate to establish jurisdiction over nonresident class members, *even in the absence of any contacts with the forum State*. Br. at 16 n.13. See also *Keeton v. Hustler*, *supra*.¹⁸ In short, the real constitutional issue in this case boils down to the difference between an opt-out provision and an opt-in provision. In our view, this

¹⁸ This concession essentially eliminates the policy arguments that Phillips advances in the third section of its brief. Br. at 36-46. The fact is that any sovereignty concerns related to personal jurisdiction requirements inevitably remain at the mercy of a party, even if he is a defendant, since he may always consent to jurisdiction. See *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, *supra*, 456 U.S. at 702-03 n.10. Moreover, the kind of rule proposed by Phillips, which apparently seeks to limit where multistate class actions can be brought on the basis of competing state interests, would only lead to further litigation over the relative interests of the states affected by the dispute. It is difficult to see how such an approach would improve relations among the states, to say nothing of its complete lack of constitutional foundation.

We should also note that the "parade of horrors" suggested by Phillips in its final argument, like most such claims, has little substance to it. Phillips asks this Court not to trust the state courts because "they will run riot with the national class action and balkanize numerous areas of substantive law." Br. at 45. The reality is that the state courts have been willing to entertain relatively few multistate class actions, and when they have done so, the cases, much like this one, have usually involved small claims that would otherwise go unremedied, and that are all truly identical in nature and easy to litigate. See, e.g., *Miner v. Gillette Co.*, 87 Ill. 246, 428 N.E.2d 478 (1981), *cert. dismissed*, 459 U.S. 86 (1982) (identical claims worth \$7.95 for each class member). Indeed in this very case the Kansas courts specifically limited the class to assure commonality of interest and manageability. J.A. 17-19. See also *Shutts I*, 567 P.2d at 1314 ("this opinion should not be read as an invitation to file nationwide class action suits in Kansas"). In trying to discern the reason for the decision below, Phillips would do better to look to its own behavior, rather than that of the Kansas courts.

distinction attempts to parse the due process requirement too finely. See Abrams & Dimond, *Toward A Constitutional Framework for the Control of State Court Jurisdiction*, 69 Minn. L. Rev. 75, 99-100 & n.124 (1984) (such a due process objection deemed "trivial"); Comment, *Jurisdiction and Notice In Class Actions: "Playing Fair" With National Classes*, 132 U. Pa. L. Rev. 1487, 1499-1500 (1984). It is certainly difficult to fathom what reasonable concern for fairness to absent class members would justify an opt-out provision for those with minimum contacts and an opt-in provision for all others.

If anything, we think that an opt-out requirement better protects the interests of absent class members. It is, of course, the procedure chosen to govern class actions under the Federal Rules. See Fed. R. Civ. P. 23(b)(3), (c)(2)(A).¹⁹ Explaining this choice, then-Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules that proposed the Rule, stated, "requiring individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who, for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 398 (1967). In short, an opt-out requirement realistically protects small claimants, who are almost certain not to pursue an independent action if excluded from the class.

An opt-out procedure also provides meaningful protection for any class member who prefers not to participate. All he need do is sign a form and mail it to the court. Even in the present case ten percent of the class exercised

¹⁹ There is no "minimum contacts" requirement for exercising jurisdiction over plaintiffs in national class actions conducted under the Federal Rules. See *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979).

this option. Clearly in cases involving larger sums there is every reason to believe that absent class members will take the steps necessary to decide whether it is in their interest to remain in or to opt out and proceed on their own. Cf. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), cert. denied, 103 S.Ct. 342 (1982) (invalidating mandatory class action involving large damages claims by plaintiffs); *In re Northern District of Cal. "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S.Ct. 817 (1983) (same).

The differing effect on large and small claimants of these kinds of transaction costs in class action litigation demonstrates that due process is better served by an opt-out provision than it would be by an opt-in provision. The procedures used by the Kansas courts, therefore, fully protected the rights of all class members, and should be upheld by this Court.²⁰

III. THE APPLICATION OF BASIC PRINCIPLES OF RESTITUTION EMBODIED IN KANSAS LAW TO ALL CLASS MEMBER CLAIMS WAS NEITHER ARBITRARY NOR UNFAIR AND RESULTED IN NO RELEVANT CONFLICT WITH THE LAW OF ANY OTHER STATE.

The second issue raised by Phillips concerns the decision by the Kansas Supreme Court to apply general prin-

²⁰ If the Court should disagree with this position and find that, in the absence of minimum contacts, an opt-in procedure is constitutionally required, this case should be remanded for an opportunity to allow nonresident class members to opt in. It would be grossly unfair to class members who all along have had reason to believe that their claims were being adjudicated in Kansas to be advised that the Kansas proceeding was void rather than voidable. This is especially so now that the statutes of limitations have run in other jurisdictions. Pet. App. 17. Nor would there be any cognizable prejudice to Phillips as a result of such a remand. Phillips' legitimate interest is to be certain that class members are bound. For those who opt in, that binding effect will have been assured. See Note, *Multistate Plaintiff Class Actions*, supra, 92 Harv. L. Rev. at 734-37 (urging a post-judgment opt-in requirement in all cases).

ciples of restitution embodied in Kansas law to all class member claims. Phillips asserts that this was error because all but a small percentage of class members had no involvement with Kansas and therefore are not entitled to the application of that State's law. In our view, Phillips' argument rests on an overreading of existing precedent and the suggestion of a conflict among the laws in various States that does not in fact exist. In any event, if it was error to apply Kansas law, the error was harmless. Phillips itself appears to recognize that Oklahoma law could properly have been applied to all claims. Br. at 45. The Kansas Supreme Court examined that State's law in *Shutts I*, and concluded that it would lead to the same result as did Kansas law. On the facts of the instant case, that conclusion from *Shutts I* merits application here.

A. The Constitutional Limitations On A State Court's Choice of Law, Which Are Intended To Protect Basic Fairness, Were Not Violated Here.

The Due Process Clause and the Full Faith and Credit Clause, taken together, require that a state court's choice of law be "neither arbitrary nor fundamentally unfair." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 308, citing *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935). The Court in *Allstate* stressed that, implicit in this constitutional inquiry, was a recognition that more than one State's law could apply, and that no "weighing-of-interests requirement" existed in such circumstances. 449 U.S. at 307-308 & n.10. Thus, a State is free to apply its own law if it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313.

In the instant case, the defendant owned property and did a significant amount of business in Kansas. While most class members had no prior contact with the State, they nevertheless were willing to have their rights ad-

judicated there since they declined to opt out. Whether these facts, standing alone, would be sufficient to justify the application of Kansas law is an issue that was explicitly left open in *Allstate*. *Id.* at 320 n.29. We think it need not be decided here either. Although *Allstate* employed a rule that focused on the "contacts" of the parties to the forum State for testing choice-of-law decisions, the Court did not hold that other factors were necessarily irrelevant to the analysis. The essence of the constitutional inquiry, of course, remains basic fairness to the parties and to the interests of other States. *See id.* at 320-32 (Stevens, J., concurring in the judgment). On the specific facts of this case, those underlying precepts were not infringed. This is especially so because, for there even to be a constitutional issue over choice-of-law decisions, there must be a genuine conflict between the laws of the forum State and those of another State with competing interests. No such conflict was present here.

The Kansas law applied in this case was by no means parochial or arcane. As the decision below makes clear, the legal analysis employed rested on fundamental "equitable principles" requiring that a "party making use of another's money should pay interest on the money so used." Pet. App. 4.²¹ This approach flowed almost inexorably from the facts presented. Thus, in essentially identical circumstances under federal law, this Court held that "the imposition of interest on refunds [due to a retroactive refusal by the FPC to approve gas rates] is

²¹ The Kansas Supreme Court applied its own State statute to determine *post-judgment* interest. Phillips does not dispute this application, nor could it. The sole purpose of *post-judgment* interest is to protect the value of the judgment rendered by the issuing court. Plainly that court has sufficient justification to support the use of its own State's law for this purpose. Addressing a similar *post-verdict* interest provision, this Court stated that "courts at the forum have been free to apply their own or some other law as they see fit." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 498 (1941) (emphasis supplied).

not an inappropriate means of preventing unjust enrichment." *United States Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 230 (1965). Cf. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (county's appropriation of interest on interpleader fund violated Fifth and Fourteenth Amendments).

It is important to recognize in this regard that the issue presented here was a by-product of the federal rate-making procedures of the FPC. If the Commission did not engage in *retroactive* rate approval, full royalty payments to all class members would have been paid on a timely basis. Although the FPC does not have authority to regulate royalty payments, see, e.g., *Mobil Oil Corp. v. Federal Power Commission*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 967 (1972), the federal impact on this case should not be ignored in addressing choice-of-law concerns.²²

Under the federal regulatory system, if Phillips' rates had been rejected the interest that it would have had to pay purchasers on the same money that it ultimately turned over to royalty owners was dictated by the FPC. See 18 C.F.R. § 154.102(c). Subject to FPC approval of the gas prices, moreover, the royalties clearly belonged to the royalty owners even while Phillips held them. See *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 363 (5th Cir.), *cert. denied*, 423 U.S. 930 (1975) (suspense royalties owed to royalty owner who had title at time original gas payment is made and not to subsequent royalty owner who had title when FPC approved rates). Prior to 1961, in fact, Phillips paid suspense royalties on a timely basis. See *Shutts I*, 567 P.2d at 1299. And even when it began

²² This does not mean that the choice-of-law decision would become "federalized" as Phillips claims. Br. at 34. We argue only that the circumstances at issue, including the implications of federal policy, are appropriate considerations for evaluating basic constitutional choice-of-law concerns.

withholding such royalties pending FPC rate approval, it still made an exception for any royalty owner who put up a bank- or corporate-backed indemnity to cover the suspense royalties *plus interest at the "applicable" FPC rates*. See *id.* at 1299-1300. In these circumstances, the Kansas Supreme Court concluded that Phillips itself had "establish[ed] an appropriate measure of damages to be awarded the royalty owners, expressed in terms of interest, for the commingling and use of suspense monies by Phillips." Pet. App. 42. The court was simply unwilling to allow Phillips to "'seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages.'" Pet. App. 31 (quoting *Shutts I*).

Phillips seeks to undermine the force of this straightforward analysis by raising several collateral issues, and then suggesting that other States would have treated them differently. It asserts that it used some of the gas itself rather than selling it, that it had a variety of different kinds of agreements with royalty owners, and that some of these agreements were pursuant to contracts with other gas producers providing for no interest if Phillips had to pay the *producer* higher prices based on subsequent FPC approval of Phillips' rates. Br. at 31-33. The indisputable facts and Phillips' own behavior, however, demonstrate that these claims are merely obfuscatory. Royalty payments to each class member were calculated in identical fashion, irrespective of whether Phillips used the gas or sold it, or whether it was paying royalties on its leases or on its agreements to pay royalties on behalf of producers from whom it had made purchases. Pet. App. 33-41. Regardless of any of these factors, moreover, Phillips treated each class member in precisely the same way: it offered each the same opportunity to receive royalties in a timely fashion upon providing an indemnity, and it paid each his full suspense royalty when the rates were approved. As the Kansas court put it, "[a]ll royalty owners, regardless of residency, particular lease pro-

visions, or royalty agreements, were given the same notices by Phillips and were treated uniformly when suspense royalties and interest were withheld." Pet App. 27.

Phillips further asserts that "the application of Kansas law results in 'unfair surprise' and the 'frustration of legitimate expectations' of Phillips." Br. at 26, quoting *Allstate, supra*, 449 U.S. at 318 n.24. The argument has a hollow ring. Not only did Phillips establish the interest rate through its FPC undertaking and its indemnity arrangement with royalty owners, but at the time that it paid most of the suspense royalties at issue here, *Shutts I*—which had analyzed the law of Oklahoma, Texas, and Kansas—had already been decided. Moreover, Phillips could have had no reasonable expectation that any particular State's law would be applied to the transactions in question since it does business in all 50 states, and its royalty agreements covered residents of 50 states who, in turn, owned leases in 11 different states. Under any view of choice-of-law principles, the number of potential States' laws that could have been found to govern these claims was almost unlimited. Significantly in this regard, Phillips does not claim that any royalty agreement provided that it would be interpreted under the law of a particular State. See *Allstate, supra*, 449 U.S. at 318 n.24.

Nor does Phillips strengthen its choice-of-law claim by combing through opinions in other jurisdictions in an effort to suggest that those States would apply different legal principles to the circumstances presented here. In fact, the cases cited by Phillips from other jurisdictions are either inapposite or simply did not consider the claim decided below. Since, to our knowledge, no State disregards basic equitable principles of restitution, see, e.g. *Smith v. Owens*, 397 P.2d 673 (Okl. 1963); *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 485-488 (Tex. 1978), it seems doubtful that any would diverge from the ruling in this case. Indeed, in *Shutts I*, 567 P.2d at 1317-21, the Kansas Supreme Court examined the

law of Oklahoma and Texas—the two States that Phillips focuses on in its brief—and concluded that both States would reach the same result as Kansas did.²³ Thus, the

²³ Phillips makes little effort to suggest that Oklahoma law would justify a different result. See Br. at 33 nn.33-34. Both the statutory and constitutional provision it cites were discussed and found inapplicable in *Shutts I*, 567 P.2d at 1319, 1321. As we indicate below, this consideration is sufficient to justify affirmance.

Several of the issues raised by Phillips with respect to Texas law were likewise resolved in *Shutts I*, 567 P.2d at 1317, 1318. Phillips also raises two additional claims based on recent Texas Supreme Court decisions. First, it cites *Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981), for the proposition that Texas would not have granted interest to those royalty owners who were due royalties under agreements between Phillips and another producer providing that Phillips would not have to pay interest to the producer based on retroactive FPC rate approvals. These agreements, however, were never consented to by royalty owners whose entitlements to royalties were based on pre-existing agreements. Pet. App. 37. In this fundamental sense, the instant case differs from *Exxon Corp.*, where the court relied on the fact that the agreements (called "division orders") which modified the original leases had been "executed by the royalty owners." 613 S.W.2d at 249 (emphasis supplied). Even then, the court held that the orders were binding only "until revoked." *Id.* at 250. The case thus supports the decision below.

Phillips also cites the decision in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, *supra*, for the proposition that Texas would require the use of its statutory interest rate rather than the FPC rates used by the court below. That case involved monies due to Stahl based on gas sold to Phillips by Stahl and then resold by Phillips at rates that were regulated by the FPC. When those rates were subsequently approved in 1972, Phillips paid Stahl an additional sum based on the higher rates. Although Stahl never requested any interest, Phillips filed a declaratory judgment action against it three years after payment. 569 S.W.2d at 482. Stahl then counter-claimed, asserting specifically that it was entitled to the Texas six percent statutory rate of interest. *Id.* at 483. It never requested the FPC rates and therefore the issue was never considered.

Lastly, we should note that Phillips' description of *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976), a case considered in *Shutts I*, 567 P.2d at 1317, is

necessary conflict, which is a prerequisite to any constitutional choice-of-law inquiry, is absent here.²⁴

In view of the foregoing, we submit that the law employed by the Kansas Supreme Court was "neither arbitrary nor fundamentally unfair," and thus violated no constitutional provision. See generally Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 Hofstra L. Rev. 59 (1981).

B. Assuming Arguendo That It Was Constitutional Error To Apply Kansas Law To All Class Member Claims, The Error Was Harmless Since Oklahoma Law, Which Is Apparently Conceded To Be Applicable, Would Have Led To The Same Result.

In a closing section of its brief that merges jurisdictional and choice-of-law issues, Phillips states that "Oklahoma appears to be a proper forum to bind all plaintiffs, since each class member had contact with that state and all additional royalties were disbursed from that state. *These contacts with Oklahoma, coupled with the interest Oklahoma has in regulating a company with its principal place*

misleading. That case involved an agreement between Phillips and two local gas producers whereby Phillips would pay royalties based on the unapproved FPC rates subject to an indemnity guaranteeing the return of the excess *plus interest* if the rates were not approved. 409 F. Supp. at 495. The producers put up the indemnity and received the money. In that circumstance, the court held that there was no interest due the producers for the time from when they executed the indemnity until they received their payments. Significantly, the court also held that another producer who did not sign an indemnity was entitled to interest on the full suspense payments. *Id.* at 493.

²⁴ In contrast to the situation in *Allstate*, *supra*, 449 U.S. at 306 n.6, it is appropriate in this case to determine whether a conflict existed, and not merely whether it was error to apply Kansas law. The Kansas court believed it was applying generally recognized equitable principles, and gave no indication that it thought a conflict with any other State's law existed. On the contrary, as noted above, the court had examined Oklahoma and Texas law in *Shutts I* and found no such conflict.

of business in Bartlesville, might well make it fair to litigate all claims in Oklahoma." Br. at 45 (emphasis supplied). Even without this apparent concession, there can be little doubt that Oklahoma law could be applied to all claims. See *Allstate Insurance Co. v. Hague*, *supra*. See also the "common fund" cases cited at p. 18 *supra*.²⁵ This fact, in turn, means that even if the court below improperly used Kansas law, the error was harmless. As Phillips acknowledges, Br. at 24 n.23, 27 n.26, the same court in *Shutts I* had applied Oklahoma law to claims identical to those raised in this case, and had concluded that the result would be the same as that reached here.

It is entirely appropriate in the present circumstances to apply the prior Kansas Supreme Court holding to the instant case: Phillips was a defendant in both cases, and it raised the same Oklahoma law issues on that appeal as it did in this case. Moreover, it cites no Oklahoma case since *Shutts I* to suggest that the Kansas court's interpretation of Oklahoma law might be different on reexamination. And although Phillips continues to assert that the Kansas Supreme Court misconstrued Oklahoma law, Br. at 33 nn. 33 & 34, that argument is not only incorrect, it is also beside the point. A state court's application of another State's law is entitled to full faith and credit so long as the legal issue was fairly considered. See, e.g., *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n*, 455 U.S. 691, 715 (1982); *Milliken v. Meyer* 311 U.S. 457 (1940).

²⁵ Because Phillips' statement about Oklahoma comes in a section of its brief that merges choice-of-law and personal jurisdiction arguments, it is not clear whether Phillips agrees that Oklahoma law could govern all claims. Earlier in its brief, however, it also suggests that if there is a common fund in this case it was in Oklahoma or Delaware. Br. at 23 n.22. Since the money was held at Phillips' headquarters in Oklahoma, for the ultimate benefit of the royalty owners, we think it is clear that that State's law could be applied to all claims, as the "common fund" cases uniformly indicate.

In sum, had the Kansas Supreme Court applied Oklahoma law to the claims at issue here, the judgment below would have been the same. It should therefore be affirmed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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